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No. 317

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

INTERNATIONAL ASSOCIATION OF MACHINISTS, LOCAL LODGE NO. 311, AFL-CIO; INTERNATIONAL ASSOCIATION OF MACHINISTS, DISTRICT LODGE NO. 91, AFL-CIO; AND INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO, *Petitioners*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No.

INTERNATIONAL ASSOCIATION OF MACHINISTS, LOCAL LODGE NO. 311, AFL-CIO; INTERNATIONAL ASSOCIATION OF MACHINISTS, DISTRICT LODGE NO. 94, AFL-CIO; AND INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO, *Petitioners*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

International Association of Machinists, Local Lodge No. 311, AFL-CIO, International Association of Machinists, District Lodge No. 94, AFL-CIO, and International Association of Machinists, AFL-CIO, pray that a writ of certiorari issue to the United States Court of Appeals for the District of Columbia Circuit in advance of judgment by that court.

OPINIONS BELOW

The decision and order of the National Labor Relations Board, Member Fanning dissenting, are reported at 121 NLRB No. 153 (*infra*, pp. 1a-7a). A supplemental decision amending the previous order, Board Member Fanning dissenting, is unreported (*infra*, pp. 22a-24a).

JURISDICTION

The petition for the writ is filed in advance of judgment by the Court of Appeals in conformity with 28 U.S.C. 1254(1) providing that "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree." See *infra*, pp. 18-19.

QUESTIONS PRESENTED

A. The following questions are those upon which the petition for the writ is predicated:

1. Whether Section 8(b)(1)(A) of the National Labor Relations Act prohibits peaceful picketing by a union to secure its recognition as the employees' exclusive bargaining representative and a union shop agreement at a time when the union does not represent a majority of the employees within the appropriate unit.

2. Whether Section 8(b)(1)(A) and (2) of the National Labor Relations Act prohibits a union from placing an employer on an "Unfair" list and a "We Do Not Patronize" list in order to secure recognition of the union as the employees' exclusive bargaining representative and a union shop agreement at a time

when the union does not represent a majority of the employees within the appropriate unit.

B. The following questions are not those upon which the petition for the writ is predicated but are additional questions which petitioners would present if the writ were granted:

1. Whether substantial evidence upon the record considered as a whole supports the Board's finding that petitioners' purpose in picketing and in listing the employer on "Unfair" and "We Do Not Patronize" lists was to secure a union shop agreement after the union had been decertified as the representative.

2. Whether the Board's order is too broad in scope in blanketly prohibiting petitioners from "Restraining or coercing the employees of Machinery Overhaul Company, Inc., in the exercise of the rights guaranteed in Section 7 of the Act, including specifically the right to refrain from engaging in any or all of the activities guaranteed thereunder."

STATUTE INVOLVED

Among the pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Secs. 151, *et seq.*), are Sections 7, 8(b)(1)(A), and 8(b)(2).

Section 8(b)(1)(A) provides that it shall be an unfair labor practice for a labor organization or its agents "to restrain or coerce employees(A) in the exercise of the rights guaranteed in section 7. . . ." Section 7 provides that:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of

> their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Section 8(b)(2) provides that it shall be an unfair labor practice for a labor organization or its agents "to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3). . . ." Section 8(a)(3) makes it an unfair labor practice for an employer to encourage or discourage membership in a labor organization by discrimination in employment, and *inter alia* excepts a union shop agreement from its scope if the "labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made. . . ."

STATEMENT

A. The Facts

Petitioners are herein called the Union. The Union began its efforts to organize the employees of the Machinery Overhaul Company, Inc., in September 1955 (*infra*, p. 11a). Late in that month it filed a petition with the Board requesting that it be certified as representative of the Company's employees in an appropriate unit (*infra*, p. 11a). The Company and the Union agreed to a consent election (*infra*, p. 11a). Shortly thereafter the Company retained a labor relations consultant who withdrew from the consent election agreement (*infra*, p. 11a). The ensuing proc-

essing of the petition through the formal procedures resulted on June 29, 1956, nine months after the petition had been filed, in the certification of the Union as the exclusive bargaining representative following its victory in an election among the employees by a vote of 63 to 28 (*infra*, pp. 11a-12a).

On July 3 and 19, 1956, the Union requested the Company to meet for the purpose of negotiating a collective bargaining agreement (*infra*, p. 12a). On July 22, 1956, the Company, through its labor relations consultant, stated that it would not meet with the Union to negotiate, pending possible judicial review of the Board's certification (*infra*, p. 12a). The Company thereafter changed its position, notified the Union that its labor relations consultant would meet with it on August 14, 1956, and requested that the Union submit a proposed contract to the Company before that meeting (*infra*, p. 12a). The Union submitted a comprehensive proposal, covering the conventional subjects of a collective bargain, including a provision for a union shop (*infra*, pp. 12a-13a). A meeting was held on August 20, 1956 (*infra*, p. 13a). On September 7, 1956, the Company sent a counterproposal to the Union, couched generally in terms more favorable to management, and omitting provision for a union shop (*infra*, p. 13a). Another meeting was held on September 13, 1956, and a stalemate on contract terms was reached (*infra*, p. 13a). On September 18, 1956, the Union struck the Company and began picketing its plant (*infra*, p. 13a).

Negotiations continued, and by November 15, 1956, tentative agreement had been reached on many subjects, but many others remained at issue (*infra*, p. 14a; G.C. ex. 4, Tr. 12-13). On November 28, 1956, the

Union proposed to settle the strike on the following terms: (1) that all strikers, upon application to return to work made not later than December 17, 1956, "be returned to their former jobs or positions without loss of seniority rights or other privileges formerly enjoyed . . ."; (2) that all employees within the unit before September 18, 1956, the date the strike began, shall become and remain members of the Union as a condition of employment, that all employees hired during the period of the strike shall not be required to join the Union but shall be required to remain members should they choose to join, and that all employees to be hired after the termination of the strike shall be required to become members "on the 31st day of employment" and thereafter remain members; (3) that "all sections of the Union proposal" upon which tentative agreement had been reached should be finally adopted; (4) that "all sections of the Union proposal not tentatively agreed upon" shall be submitted to a named "U. S. Commissioner of Conciliation" for his "recommendations" to which the "parties agree to be bound . . ."; and (5) that "the parties agree to enter into negotiations on wages immediately upon the execution" of the strike settlement agreement, with "All employees on the payroll as of September 18, 1956, . . . [to] receive the highest rate of wages presently being paid for his classification, but in any event an increase of not less than 15c per hour above his former rate of pay . . . to be retroactive to July 3, 1956" (G.C. ex. 5, Tr. 13, *infra*, p. 2a, n. 1).

The Company rejected the Union's strike settlement proposal (*infra*, p. 2a, n. 1, Tr. 33). Its position is reflected in its counterproposal submitted sometime between November 28 and December 18, 1956

(Tr. 33, 24, G.C. ex. 12). Among the numerous points of difference was the Company's omission of any provision for union security and its proposal that the wage rates shall constitute a "minimum" scale only with the Company empowered to increase the rates unilaterally based on its determination of merit (G.C. ex. 12, Art. VIII, Sec. 1). The record does not show that any further negotiations took place between the Company and the Union after this impasse had been reached.

On September 25, 1957, more than nine months later, based on a decertification petition filed by an individual employee, the Board directed that an election be conducted among the Company's employees (*infra*, p. 14a). "After the commencement of the strike, the Employer began hiring new employees. Evidence submitted by the Employer indicates that several months ago [*i.e.*, several months before October 23, 1957] these new hires plus the nonstriking employees and returned strikers filled all vacancies and a full complement of employees was reached. The only hiring that has been done since that time is that necessary to maintain the complement by reasons of vacancies created through normal turnover" (G.C. ex. 2B, Report on Objections, p. 4, Tr. 14). In the literature it distributed to its employees before the election, the Company stressed that "employees on strike who are not entitled to reinstatement since their jobs are now permanently filled *will not be eligible to vote* in this election" (*id.* at 3).[1]

The Union lost the election and on December 16, 1957, the Board certified that the Union "is not the

[1] Section 9(c)(3) of the National Labor Relations Act provides in pertinent part that "Employees on strike who are not entitled to reinstatement shall not be eligible to vote."

exclusive representative of the employees . . ." (*infra*, pp. 14a-15a).

After its decertification the Union continued to picket the premises of the Company (*infra*, p. 15a). Since July 8, 1937—and thus seven months after the breakdown of negotiations between the Company and the Union (*supra*, pp. 6-7)—the Union has placed the Company on an "Unfair" list and or a "We Do Not Patronize" list (*infra*, p. 16a, Tr. 39-40, 36). Although the record is not clear, it appears that the "Unfair" list may be posted at the Union's halls (Tr. 36), one located five miles from the plant and the other 60 to 70 miles from the plant (Tr. 21), and that the "We Do Not Patronize" list is published in a union newspaper circulated among its subscribers (Tr. 36-39).

B. The Board's Conclusions and Order

The Board, one member dissenting, found that the "Union violated Section 8(b)(1)(A) and (2) of the Act by picketing the Company and placing its name on 'unfair' and 'we do not patronize' lists for the purpose of gaining exclusive recognition and a union shop after the . . . Union had been decertified by the Board as the exclusive bargaining representative of the employees in the appropriate unit" (*infra*, p. 2a). The Board supported this conclusion on the authority of its decisions in *Curtis Brothers, Inc.*, 119 NLRB 232, enforcement denied, 43 LRRM 2156 (C.A.D.C.), certiorari granted, No. 34, October Term 1959, *Alloy Manufacturing Company*, 119 NLRB 307, enforcement denied in part, 263 F. 2d 796 (C.A. 9), certiorari pending, No. 57, October Term 1959, and *Shepherd Machinery Co.*, 119 NLRB 320 (*infra*, p. 2a, n. 3).

As amended, the Board's order requires that the Union shall cease and desist from (*infra*, pp. 4a-5a, 23a):

"(a) Restraining or coercing the employees of Machinery Ovehaul Company, Inc., in the exercise of the rights guaranteed in Section 7 of the Act, including specifically the right to refrain from engaging in any or all of the activities guaranteed thereunder.

"(b) Attempting to cause Machinery Overhaul Company, Inc., by means of picketing or placing the Company's name on the Respondents' 'unfair' list or 'we do not patronize' list, to recognize the Respondents as the exclusive bargaining representatives of the Company's employees, when the Respondents do not represent a majority of such employees in an appropriate unit.

"(c) Attempting to cause Machinery Overhaul Company, Inc., by means of picketing or placing the Company's name on the Respondents' 'unfair' list or 'we do not patronize' list, to enter into a union security agreement with the Respondents when the Respondents do not represent a majority of the Company's employees in an appropriate unit."

C. Proceedings in the Court Below

The Union petitioned the court below to review and set aside the Board's order, and in its answer the Board requested enforcement of its order (R. 1-5, 45-53). On June 2, 1959, the Board moved the court below to "hold in abeyance all further proceedings in this case . . . until after final disposition by the Supreme Court of *N.L.R.B. v. Drivers Local Union No. 639*, No. 717, October Term, 1958, on the Docket of the Supreme

Court" (R. 54). In support of this motion, the Board stated in part that (R. 54-54B):

> 2. The principal legal issue in this case is whether picketing and the circulation of "unfair" and "we do not patronize" lists by a minority union for the purpose of obtaining recognition by an employer as the exclusive representative of his employees is a violation of Section 8(b)(1)(A) of the National Labor Relations Act. This issue, insofar as it involves picketing, is presently pending before the Supreme Court in *N.L.R.B.* v. *Drivers Local No. 639*, No. 717, October Term, 1958, certiorari granted April 20, 1959, to this Court to review its determination that such picketing does not constitute an unfair labor practice. It is expected that *Local No. 639* will be heard in the Supreme Court early this fall.
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> * * *
>
> 4. The fact that the present case involves circulation of "unfair" and "we do not patronize" lists as well as picketing, and *Local No. 639* before the Supreme Court involves only picketing, does not militate against the granting of this motion. If the Supreme Court, in agreement with this Court, should determine in *Local No. 639* that the picketing there involved does not violate Section 8(b)(1)(A) of the Act, it will necessarily follow that the use in this case of "unfair" and "we do not patronize" lists likewise does not violate that Section. Thus, the Supreme Court decision may be controlling on all aspects of the Section 8(b)(1)(A) conduct involved in this case. Moreover, even if the Supreme Court should affirm the Board's finding of a violation respecting picketing, its analysis of the problem and expression of views will be of the utmost importance as a guide to the determination of whether the "unfair" and "we do not patronize" lists—which present free speech problems not present with respect to picketing—should nonetheless be found

lawful in the circumstances of this case. Upon this premise, it is also appropriate to await decision of the Supreme Court before proceeding herein.

In its answer to the Board's motion, the Union stated that (R. 54D-54E):

> The Board acknowledges that the single question presently before the Supreme Court pertains to picketing. It also acknowledges that the instant proceeding presents additional questions, namely, (1) whether the circulation of "unfair" and "we do not patronize" lists as an exercise of pure speech violates Section 8(b)(1)(A) of the National Labor Relations Act, and (2) whether, independently of Section 8(b)(1)(A), the petitioners engaged in conduct in violation of Section 8(b)(2).
>
> Inasmuch as the case presently before the Supreme Court does not cover the ground of the instant case, we would not be disposed to agree to hold this case in abeyance because of the pendency of the case before the Supreme Court. However, a petition for a writ of certiorari is presently pending before the Supreme Court in *International Association of Machinists, Lodge 942, AFL-CIO* v. *N.L.R.B.*, No. 865, October Term 1958. The latter case does present both the picketing and "unfair" listing questions. Were the Supreme Court to grant the writ in the *Machinists* case, we would then be willing to hold the instant case in abeyance. On the other hand, were the Supreme Court to deny the writ, or were the grant limited to the picketing question, we would wish to consider our position in this case in the light of that action. We anticipate that the Supreme Court will act on the petition in the *Machinists* case at this term. Should the Supreme Court fail to act on the petition at this term, we would not wish to

rely further on the *Machinists* case in formulating our position in this case.

WHEREFORE, petitioners cross-move the Court to defer petitioners' final response to the Board's motion to hold proceedings in this case in abeyance until ten days after the Supreme Court acts on the petition in *International Association of Machinists, Lodge 942, AFL-CIO* v. *N.L.R.B.*, No. 865, October Term, 1958, or until ten days after the Supreme Court terminates its October Term 1958, whichever occurs sooner.

On June 19, 1959, the court below entered an order in accordance with the Union's cross-motion (R. 55). On June 29, 1959, this Court terminated its October Term 1958 without acting upon the petition in the *Machinists* case. On July 1, 1959, the Union filed a further statement with the court below, averring in part that it has "decided to petition for a writ of certiorari in the instant case in advance of judgment by this Court in accordance with 28 U.S.C. § 1254" (R. 56). On July 21, 1959, the court below ordered that "further proceedings in this case be held in abeyance pending final disposition by the Supreme Court of the case of *National Labor Relations Board* v. *Drivers Local Union No. 639*, No. 717, October Term, 1958, renumbered No. 34, October Term 1959, with leave to petitioners to apply to this court by appropriate motion to vacate the stay of proceedings herein if and when the Supreme Court denies their petition for writ of certiorari in this case" (R. 58).

REASONS FOR GRANTING THE WRIT

1. Whether Section 8(b)(1)(A) of the National Labor Relations Act prohibits peaceful picketing by a union to secure its recognition as the exclusive bargaining representative at a time when the union does

not represent a majority of the employees within the appropriate unit is a question upon which this Court has already granted the writ. *National Labor Relations Board* v. *Drivers Local Union No. 639*, No. 34, October Term 1959. When the Court granted the writ in the latter case there was no conflict of decisions among the courts of appeals. A conflict has since arisen, the Court of Appeals for the Fourth Circuit in *National Labor Relations Board* v. *United Rubber Workers*, 44 LRRM 2465 (June 26, 1959), having decided the question differently from the Court of Appeals for the District of Columbia whose judgment this Court granted the writ to review.

A related facet of the question is whether Section 8(b)(1)(A) prohibits peaceful picketing by a union to secure a union shop agreement at a time when the union does not represent a majority of the employees within the appropriate unit. The same considerations govern whether the object is to secure exclusive recognition or a union shop agreement. As the Board stated in *Alloy Manufacturing Co.*, 119 NLRB 307, 308, enforcement denied in part, 263 F. 2d 796 (C.A. 9), certiorari pending, No. 57, October Term 1959, "Concession by an employer of a union shop agreement to a union necessarily presupposes recognition of that union as the exclusive representative, and [the] . . . same underlying considerations . . . leading to the conclusion that picketing for exclusive recognition restrains and coerces within the meaning of Section 8(b)(1)(A), apply with equal force to picketing by a minority union for purposes of obtaining a union shop agreement." Accordingly, the answer to the question upon which this Court has granted the writ controls the answer to this facet of the question.

2. There is a conflict of decision upon the question whether Section 8(b)(1)(A) prohibits a union from publishing "Unfair" and "We Do Not Patronize" lists in order to secure recognition of the union as the employees' exclusive bargaining representative at a time when the union does not represent a majority of employees within the appropriate unit. The Court of Appeals for the Ninth Circuit holds that it does not (*National Labor Relations Board* v. *International Association of Machinists, Lodge 942, AFL-CIO*, 263 F. 2d 796, certiorari pending, No. 57, October Term 1959), while the Court of Appeals for the Fourth Circuit holds that it does (*National Labor Relations Board* v. *United Rubber Workers*, 44 LRRM 2465 (June 26, 1959)). This question is presented in the pending petition in *International Association of Machinists, Lodge 942, AFL-CIO* v. *National Labor Relations Board*, No. 57, October Term 1959, having been raised in the reply brief, and the Court is respectfully referred to pages 2-5 of the reply brief for an elaboration of the question.

A related facet of this question is whether Section 8(b)(1)(A) and (2) prohibits a union from publishing "Unfair" and "We Do Not Patronize" lists in order to secure entry into a union shop agreement at a time when the union does not represent a majority of employees within the appropriate unit. This facet of the question was also before the Court of Appeals for the Ninth Circuit. In holding that the publication of such lists is not within the prohibition of the statute, the Ninth Circuit blanketed all facets of the question under a common rationale. 263 F. 2d at 799-800.

3. The additional questions upon which this petition is not predicated but which petitioners desire to present if the petition is granted raise the following matters:

(a) The validity of the Board's conclusion that petitioners violated Section 8(b)(2) by picketing for a union shop agreement after decertification as the representative depends upon whether substantial evidence upon the whole record support the Board's finding that this was the purpose of the picketing. The Board predicates the finding exclusively upon the circumstance that, at the time of the breakdown of the negotiations *one year before* the decertification of the Union, provision for a modified union shop was among the Union's proposals (*supra*, p. 6). Thus the Board infers that the Union continued to seek a union shop after it was no longer legal to do so from the fact that the Union sought a union shop at a time when it was legal for it to do so. And the Board indulges this presumption of illegal conduct despite the passage of one year from the breakdown of negotiations to decertification, and the further passage of six and one-half weeks between decertification and the unfair labor practice hearing, during which no negotiations took place so far as the record shows (*supra*, p. 7). Thus the Board's inference is supported by no reasonably recent evidence. No bargainer would suppose that a position taken one year before and not recently tested was a reliable basis for believing that the position remained unchanged and unchangeable.

Furthermore, in its preoccupation with the union shop, the Board ignores the fact that this was but one of numerous subjects at issue at the time of the breakdown of negotiations (*supra*, pp. 5-7). Prominent

among these were the important subjects of wages and reinstatement of strikers (*supra*, pp. 6-7). The object of picketing is that which would satisfy its aim. It can hardly be supposed that, were other subjects of difference composed, the Union would still have insisted upon the union shop as the price of agreement. The fact is that, at the time when the Union was still the acknowledged representative, it had already begun to recede from its initial position upon the union shop (*supra*, p. 6). In sum, to pick one issue from numerous, important and unresolved subjects, and to say more than one year after the breakdown of negotiations that the picketing was purposed by this one issue, is to predicate a finding upon sheer speculation.

(b) The Board's order is too broad in blanketly prohibiting the Union from "Restraining or coercing the employees of Machinery Overhaul Company, Inc., in the exercise of the rights guaranteed in Section 7 of the Act, including specifically the right to refrain from engaging in any or all of the activities guaranteed thereunder" (*infra*, p. 4a). So uncircumscribed an order is at war with the principle that "To justify an order restraining other violations it must appear that they bear some resemblance to that which the . . . [wrong-doer] has committed or that danger of their commission in the future is to be anticipated from the course of his conduct in the past." *National Labor Relations Board* v. *Express Publishing Co.*, 312 U.S. 426, 437. The order as it now reads encompasses within its sweep such conduct as "assaults and batteries on nonstriking employees; stoning, clubbing and, attempting to overturn automobiles of nonstrikers; threats of physical violence; and erecting barriers to plant entrances during picketing." N.L.R.B., Fifteenth Annual

Report, 127 (1950). Nothing in the Union's activity in this case furnishes the slightest justification for an order which reaches such conduct. Furthermore, the Board's interpretation of the scope of Section 8(b)(1)(A) does not confine it to picketing and consumer appeals to secure recognition of and entry into a union shop agreement with a minority union. It extends to any activity which, upon a "balancing of the legitimate interests," the Board would find does not justify the alleged restraint.[2] Thus the order requires the Union to refrain from violations which are unknown and unknowable because they are still within the bosom of the Board. "A party is entitled to a definition as exact as the circumstances permit of the acts which he can perform only on pain of contempt of court." *J. I. Case Co.* v. *National Labor Relations Board*, 321 U.S. 332, 341. Finally, the acts now found to be prohibited by Section 8(b)(1)(A) were for the first ten years of the administration of the Taft-Hartley Act uniformly found not to be within that section's purview. In this context the doing of the acts hardly shows that predilection for disobedience of the law which would justify an order extending to any and all of the dissociated offenses which the section reaches. The order should have been confined to the conduct found to violate Section 8(b)(1)(A). The "decree of enforcement should not extend further than necessary to prevent the taking of the prohibited action. . . ." *National Labor Relations Board* v. *Crompton-Highland Mills, Inc.*, 337 U.S. 217, 226.

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[2] *Curtis Bros., Inc.*, 119 NLRB 232, 238-239, enforcement denied, 43 LRRM 2156 (C.A.D.C.), certiorari granted, No. 34, October Term 1959.

4. The grant of the writ before judgment is appropriate where, as here, the identical question is already before the Court in another case.[3] It serves to illuminate a common legal question by the light cast from variegated fact situations.[4]

The grant of the writ is squarely within 28 U.S.C. 1254(1), for this is a case "in" the Court of Appeals, and therefore the writ may be granted "before" judgment. A doubt has been expressed, however, as to the constitutional power of Congress to invest this Court with jurisdiction to act before judgment where the original determination is that of an administrative agency, the thought being that for this Court to act without an intermediate judicial review would constitute the exercise of original rather than appellate jurisdiction in circumstances outside the scope of Article III, Section 2, of the Constitution.[5] The doubt seems insubstantial.

Review by this Court would of course constitute the exercise of judicial power. *Federal Radio Commission* v. *Nelson Brothers B. & M. Co.*, 289 U.S. 266, 274-278. And the same elements which identify it as the exercise of judicial power also identify it as the exercise of the appellate function. The route to review is an

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[3] *Taylor* v. *McElroy*, 3 L. ed. 2d 1528, 1529; *Brown* v. *Board of Education*, 344 U.S. 1, and related case, *Bolling* v. *Sharpe*, 344 U.S. 873, 347 U.S. 497; *White* v. *Mechanics' Securities Corp.*, 269 U.S. 283, 299; *Johnson* v. *United States Shipping Board*, 280 U.S. 320, 324-5; *Graham & Foster* v. *Goodcell*, 282 U.S. 409, 411-2, 415, n. 2.

[4] *Cf. Brown* v. *Board of Education*, 344 U.S. 1.

[5] Robertson and Kirkham, Jurisdiction of the Supreme Court of the United States, §§ 132, 164 (Wolf. and Kurl. ed. 1951); cf. Stern and Gressman, Supreme Court Practice, 14 (2d ed. 1954).

"appeal from the decision of an administrative body." *Id.* at 277. In this case, since the Board's determination is reached by a procedure which procedurally and substantively has "a distinctly judicial character" (*Evans* v. *International Typographical Union*, 76 F. Supp. 881, 886 (D. C. Ind.)), review of that determination is necessarily appellate. Accordingly, review by this Court before judgment can be thought to have other than an appellate nature only upon the assumption that the Constitution confines the Court's exercise of appellate jurisdiction solely to tribunals which are structurally within the judicial hierarchy. But the test of appellate jurisdiction would seem appropriately to be functional rather than exclusively structural. As the Court stated in a related context, the "question depends not upon the character of the body, but upon the character of the proceedings." *Prentis* v. *Atlantic Coast Line Co.*, 211 U.S. 210, 226.

CONCLUSION

For the reasons stated this petition for a writ of certiorari should be granted.

Respectfully submitted.

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Washington 6, D. C.

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Attorneys for Petitioners

August 1959.

APPENDIX

APPENDIX A

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case No. 21-CB-982

INTERNATIONAL ASSOCIATION OF MACHINISTS, LOCAL LODGE No. 311, AFL-CIO; INTERNATIONAL ASSOCIATION OF MACHINISTS, DISTRICT LODGE No. 94, AFL-CIO; and INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO

and

MACHINERY OVERHAUL COMPANY, INC.

and

SOUTHERN PACIFIC COMPANY, *Intervenor*

Decision and Order

On April 28, 1958, Trial Examiner David F. Doyle issued his Intermediate Report in the above-entitled proceeding finding that the Respondents had engaged in, and were engaging in, certain unfair labor practices, recommending that they cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the Respondents filed exceptions to the Intermediate Report.

Pursuant to the provisions of Section 3 (b) of the National Labor Relations Act, the Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions, and the entire record in the case and hereby

adopts the findings,[1] conclusions, and recommendations[2] of the Trial Examiner.

In agreement with the Trial Examiner we find that the Respondent Union violated Section 8 (b) (1) (A) and (2) of the Act by picketing the Company and placing its name on "unfair" and "we do not patronize" lists for the purpose of gaining exclusive recognition and a union shop after the Respondent Union had been decertified by the Board as the exclusive bargaining representative of the employees in the appropriate unit.[3]

Our dissenting colleague speculates that the Respondent Union may have retained its "majority status" by representing a majority of *all* employees of the Company, but that it is merely unable to demonstrate this fact because of the ineligibility of certain replaced strikers to vote in a Board-conducted election. We believe it to be clear that a union enjoys "majority status" within the purview of

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[1] In the Intermediate Report, page 4, line 55, to page 5, line 4, the Trial Examiner erroneously reported that on November 28, 1956, the Company offered to reinstate the strikers and to accept a modified union security provision limited to the employees on the Company's payroll as of September 18, 1956, and that the Respondents did not accept this proposal. The record shows that this proposal was made by the Respondents rather than by the Company. The Intermediate Report is hereby corrected accordingly. We find that this error has no bearing on the issue in this case and on its disposition.

[2] On page 8 of the Intermediate Report, the Trial Examiner recommended that the Board petition the appropriate United States District Court for an injunction pursuant to Section 10 (j) of the Act in the event that the Respondents' Unions should fail to cease and desist from the unfair labor practices founded by him. We do not believe that it was within the province of the Trial Examiner to make such recommendation. We do not adopt it.

[3] *Curtis Brothers, Inc.*, 119 NLRB No. 33; *Alloy Manufacturing Company*, 119 NLRB No. 38; *Shepherd Machinery Company*, 119 NLRB No. 139.

the Act only if it represents a majority of the employees who compose the electorate in an appropriate unit, excluding those who have been denied the franchise under the provisions of Section 9 (c) (3) of the Act.[4]

Our dissenting colleague is further concerned that Section 9 (c) (3) as interpreted by us may nullify employee rights statutorily protected under Section 7 and 13 of the Act. As the Board has said in the leading case on the construction and application of Section 9 (c) (3),[5] this section "places no limitation on the right to strike although it may indeed discourage its exercise in some situations by denying the franchise to those strikers who lose their right to reinstatement." It was also there contended that this places such hazards upon the exercise of the right to strike as to make the guarantee of that right in Section 13 of the Act a nullity. The Board answered this assertion as follows:

> This contention, being directed to the desirability of the amendment contained in Section 9 (c) (3), should be directed to the Congress and not to this Board. As we pointed out in another connection, 'It is our

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[4] Section 9 (c) (3) reads in pertinent part as follows:

> "Employees on strike who are not entitled to reinstatement shall not be eligible to vote."

See Senate Report No. 105 on S. 1126 (1 Leg. Hist. 414);

> When elections are conducted during a strike, situations frequently arise wherein the employer has continued to operate his business with replacement workers. If such a strike is an economic one and not caused by unfair labor practices of the employer, strikers permanently replaced have no right to reinstatement (*N.L.R.B.* v. *Mackay Radio*, 304 U.S. 333). It appears clear that a striker having no right to replacement should not have a voice in the selection of the bargaining representative, and the committee bill so provides.

[5] *The Pipe Machinery Company*, 79 NLRB 1322, 1324.

duty to administer the law as written, not to pass upon the wisdom of its provisions."[6]

We believe that the above language has equal application to the position of our dissenting colleague.

ORDER

Upon the entire record in this case, and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that International Association of Machinists, Local Lodge No. 311, AFL-CIO; International Association of Machinists, District Lodge No. 94, AFL-CIO; and International Association of Machinists, AFL-CIO; their officers, representatives, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Restraining or coercing the employees of Machinery Overhaul Company, Inc., in the exercise of the rights guaranteed in Section 7 of the Act, including specifically the right to refrain from engaging in any or all of the activities guaranteed thereunder.

(b) Attempting to cause Machinery Overhaul Company, Inc., by means of picketing or placing the Company's name on the Respondents' "unfair" list or "we do not patronize" list, to recognize the Respondents as the exclusive bargaining representative of the Company's employees or to enter into an agreement with them, when the Respondents do not represent a majority of such employees in an appropriate unit.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Post at their Los Angeles, California, business offices, meeting places, and all other places where notices to

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[6] Ibid. at page 1325.

their members are usually posted copies of the notice attached to the Intermediate Report and marked as "Appendix."[7] Copies of said notice to be furnished by the Regional Director for the Twenty-first Region shall, after being duly signed by official representatives of the Respondents, be posted by the Respondents immediately upon receipt thereof and maintained by them for a period of sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondents to insure that said notices are not altered, defaced, or covered by any other material;

(b) Mail to the Regional Director for the Twenty-first Region copies of the notice attached to the Intermediate Report and marked "Appendix"[8] for posting at the business offices of Machinery Overhaul Company, Inc., said company willing, for sixty (60) consecutive days, in places where it customarily posts notices to its employees. Copies of the notice, to be furnished by the Regional Director for the Twenty-first Region, shall be returned forthwith to the Regional Director after they have been signed by the official representatives of the Respondent Unions for said posting;

(c) Notify the Regional Director for the Twenty-first Region, in writing, within ten (10) days from the date of

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[7] This notice, however, shall be, and it hereby is, amended, by striking from the first paragraph the words "RECOMMENDATIONS OF A TRIAL EXAMINER" and substituting in lieu thereof the words "A DECISION AND ORDER." In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "PURSUANT TO A DECISION AND ORDER" the words "PURSUANT TO A DECREE OF THE UNITED STATES COURT OF APPEALS, ENFORCING AN ORDER."

[8] See footnote 7.

this Order what steps Respondents have taken to comply herewith.

Dated, October 3, 1958, Washington, D. C.

.....

Philip Ray Rodgers, Member

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Stephen S. Bean, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

JOHN H. FANNING, MEMBER, dissenting:

This case graphically illustrates the inequitable and unsound aspects of the majority's *Curtis Brothers* decision,[9] to which I adverted in my dissenting opinion in *Andrew Brown Company*.[10] The record shows that this Union claimed to represent a majority of the Employer's employees as far back as September 1955. At first the Employer agreed to a consent election. Shortly thereafter, however, the Employer retained one Mrs. Edwin Selvin, a labor relations consultant. Mrs. Selvin withdrew the consent agreement, forcing a resolution of the representation question to be delayed until June 29, 1956. Although the Union had won a Board election overwhelmingly and was certified by the Board as the exclusive representative of the employees, Mrs. Selvin initially took the position that she would not bargain with the Union pending judicial review of the Board's certification. Subsequently, the Employer and the Union did negotiate. No agreement on a contract having been reached, the Union struck on September 18, 1956. The Employer continued operations with replacements and non-striking employees. On September

[9] 119 NLRB No. 33.

[10] 120 NLRB No. 89.

25, 1957, the Board held a decertification election and this time the Union lost overwhelmingly. On this occasion the employees on strike, who had been permanently replaced, were ineligible to vote under the provisions of Section 9(c)(3) of the Act.

Now the majority holds that the Union's continued picketing is a violation of Section 8(b)(1)(A) of the Act because, as a consequence of a lawful strike, it no longer represents a majority of the employees eligible to vote. It is perfectly clear, however, that *the replaced strikers, while ineligible to vote, are nevertheless employees of this employer.*[11] It may well be that this Union still represents a majority of all employees of the Employer, but this fact cannot be demonstrated because of the ineligibility to vote of the replaced strikers. I do not believe, however, that the majority or minority status of the Union can or should be determinative of its right to picket and publicize its dispute with this Employer. As I have pointed out previously, these rights are statutorily protected under Sections 7 and 13 of the Act. To hold that they have been completely nullified by a companion section of the Act seems to me wrong in equity, wrong in law, and wrong in labor-management relations.

Dated, October 3, 1958, Washington, D. C.

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John H. Fanning, Member

NATIONAL LABOR RELATIONS BOARD

[11] *N.L.R.B.* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
BRANCH OFFICE
SAN FRANCISCO, CALIFORNIA

Case No. 21-CB-982

INTERNATIONAL ASSOCIATION OF MACHINISTS,
LOCAL LODGE No. 311, AFL-CIO;
INTERNATIONAL ASSOCIATION OF MACHINISTS,
DISTRICT LODGE No. 94, AFL-CIO; and
INTERNATIONAL ASSOCIATION OF MACHINISTS,
AFL-CIO

and

MACHINERY OVERHAUL COMPANY, INC.

and

SOUTHERN PACIFIC COMPANY, *Intervenor*

Carl Abrams, Esq., and *Kenneth M. Schwartz, Esq.*, both of Los Angeles, Calif., for the General Counsel.

Burt Mathes, Esq. and *Mrs. Edwin Selvin*, both of Los Angeles, Calif., for the above-named Company.

Plato E. Papps, Esq., of Washington, D. C., *Alfred M. Klein, Esq.*, and *T. B. Aycock*, Grand Lodge Representative, of Los Angeles, Calif., for the above-named Unions.

W. A. Gregory, Esq., and *H. S. Lentz, Esq.*, of San Francisco, Calif., for Southern Pacific Company, Intervenor.

Before: *David F. Doyle*, Trial Examiner.

Intermediate Report and Recommended Order

STATEMENT OF THE CASE

This proceeding is brought under Section 10(b) of the National Labor Relations Act, 61 Stat. 136, pursuant to a complaint issued by the General Counsel of the National

Labor Relations Board against the Respondent Unions.[1] The complaint, dated January 8, 1958, alleged that the Union had violated Sections 8(b)(1)(A) and (2) of the Act, by restraining and coercing employees of the Company in the exercise of their rights guaranteed by Section 7 of the Act and by attempting to cause the Company to discriminate against its employees in violation of Section 8(a)(3) of the Act. The complaint specified that the Union had (a) picketed the plant of the Company; (b) publicized an unfair list which contained the name of the Company; and (c) made appeals to the Company's customers not to do business with the Company, for the purpose of causing, forcing, or requiring the Company (1) to recognize it as exclusive bargaining representative of the Company's employees and (2) to enter into a union shop contract with the Company, notwithstanding the fact that the Union was not and had not been, since December 16, 1957, the representative of a majority of said employees.

By answer the Union denied the commission of any unfair labor practices and affirmatively alleged that its conduct was in all respects lawful.

Pursuant to notice, a hearing was held in Los Angeles, California, on February 5, 1958, before the undersigned, the duly designated Trial Examiner. The parties were represented by counsel who were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce relevant evidence. At the close of the hear-

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[1] In this report the Respondent Unions, who acted in concert, are referred to individually as Local Lodge No. 311, and District Lodge No. 94 and the International, and, jointly, as the Union; Machinery Overhaul Company, Inc., as the Company or Machinery Overhaul; the General Counsel of the Board and his representative at the hearing, as the General Counsel; the Southern Pacific Company, as Southern Pacific; the National Labor Relations Board, as the Board; and Labor Management Relations Act of 1947, as amended, as the Act.

ing the parties were given an opportunity to argue orally and to file briefs.

The Nature of the Evidence

At the hearing, counsel for all parties conferred, and agreed to a series of stipulations, by virtue of which numerous documents were received in evidence. Stipulated statements of counsel amplified and explained these documents. In consequence, the facts hereafter found are based almost entirely on this undisputed evidence.[2]

Upon the entire record in the case, I make the following:

Findings of Fact

I. The business of the Company

The Company is a California corporation, with its plant and principal place of business at Palmdale, California, where it engages in the storage, repair and preservation of machine tools for the United States Air Force. It provides these services, which are directly related to the national defense, pursuant to government contracts, and annually receives payments in excess of $100,000 for such services.

I find that the Company is, and at all times material herein has been, engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The labor organizations involved

I find that Local Lodge No. 311, District Lodge No. 94, and the International are, and at all times material herein

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[2] On only one factual point were the parties unable to stipulate. This point was reserved, to be covered by verbal testimony. When the testimony was proffered by the Union, the undersigned ruled it inadmissible upon proper objection of the General Counsel. Thereafter, the Union made an offer of proof, which was rejected, as was an exhibit proffered in connection with the offer of proof. Union Exhibit No. 2. (Rejected)

were, labor organizations within the meaning of Section 2(5) of the Act.

III. The unfair labor practices

(a) The certification of the Union

The Union began its efforts to organize the employees of the Company in September 1955. Late in that month it filed a petition with the Board requesting that it be certified as representative of the Company's employees in an appropriate unit. Shortly thereafter a field examiner of the Board conducted an informal conference attended by representatives of the Company and the Union at the offices of the Company at Palmdale. At this conference the parties agreed upon the employees constituting an appropriate unit, and agreed to a consent election. Shortly thereafter, Mrs. Selvin, a labor relations consultant who was retained by the Company, withdrew the consent election agreement, and the Board, acting upon the Union's petition, issued a notice of hearing for October 25, 1955. The hearing was held as scheduled, and on December 5, 1955, the Board issued its Decision and Direction of Election.[3]

On January 17, 1956, the Regional Director (Los Angeles, California) conducted an election in the unit with the result that 65 employees voted in favor of the Union, 28 voted "no union," and two ballots were challenged.

On January 22, 1956, the Company filed timely objections to the conduct of the election on the grounds that certain irregularities had impaired the secrecy of some ballots, and on the ground that the Union had interfered with the employees' free and untrammeled choice of a bargaining representative.

On January 30, 1956, the Union filed its answer to the Company's objections to the conduct of election.

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[3] *Machinery Overhaul Company, Inc.*, 115 NLRB No. 272.

On April 4, 1956, the Regional Director, after investigation, filed his findings and conclusions on the objections. He found the objections to be without merit. On April 27, 1956, the Company filed timely exceptions to the Regional Director's findings and conclusions.

On June 29, 1956, the Board approved the Regional Director's findings and conclusions, and certified the Union as the collective bargaining representative of the Company's employees in the appropriate unit.

(b) The negotiations

On July 3 and 19, 1956, representatives of the Union by letter requested the Company to meet with them for the purpose of negotiating the terms of a contract covering the employees in the appropriate unit.

On July 22, 1956, Mrs. Selvin addressed a letter to the Union which stated that she would not meet with the Union to negotiate, pending a possible judicial review of the Board's certification, and further stated that she had been designated by the board of directors to represent the Company in all matters pertaining to these negotiations.

Shortly thereafter, the position of the Company changed with respect to seeking a possible review of the Board's determination, and the Company notified the Union that its representative, Mrs. Selvin, would meet with the Union on August 14, 1956, and requested that a copy of the Union's proposed contract be sent Mrs. Selvin for her consideration prior to the forthcoming meeting. A business representative of District 94 supplied such a copy of the Union's proposals to Mrs. Selvin.

This original proposal of the Union was a contract complete in every detail.[4] There were articles providing for union shop, and *checkoff* of union dues, in addition to pro-

[4] General Counsel Exhibit No. 3.

visions relating to recognition, hours of work, wages, shift bonus, call-in time, new employees, holidays, vacations, leave of absence, discharges, severence pay, safety and sanitary conditions, safety committee, alteration of agreement, seniority, shop committee, grievance procedure (which provided for arbitration of grievances), rest periods and wash-up time, promotions and transfers, sick leave pay, strike and lockout, blood bank, apprentices, agreement to furnish data, visitation rights of union representatives, uniforms, insurance, and duration of contract.

On August 20, 1956, representatives of the parties met and conferred on the basis of the Union's proposed contract, and agreed to meet again on September 13, 1956. In the interim, on September 6, 1956, Mrs. Selvin, by letter notified Weitzel, business representative of District No. 94, that she had reviewed the Union's proposals and had prepared certain counterproposals which had gone to management for its approval. On the next day the Company forwarded three copies of these counterproposals to Weitzel with the information that management had placed its approval on the counterproposals.[3]

The counterproposals of the Company dealt with many of the subjects covered by the Union's proposals. However, the Company's counterproposals contained no provision for *union shop* and *checkoff of union dues*, and, in general, was couched in terms more favorable to management.

(c) The strike

On September 13, 1956, representatives of the parties met and continued to negotiate but reached a stalemate on contract terms, and on September 18, 1956, the Union struck the Company and began picketing the Company's plant at Palmdale.

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[3] Union Exhibit No. 1.

It is clear from all the evidence that the representatives of the parties conferred on at least two occasions thereafter.

From copies of proposed contracts, which are in evidence,[6] it appears that representatives of the parties reached a tentative agreement on many features of the proposed contract. However, among the points on which they could not agree, was the union shop provision required by the Union. In a proposal, made on November 28, 1956, the Company offered to reinstate the strikers and to accept the union shop provisions as to those employees on the payroll of the Company on September 18, 1956, but to permit men hired as replacements, and still employed, and new hires, freedom to join or refrain from joining the Union. The Union did not accept this proposal, and there is no evidence in this record that the Union ever withdrew its request for a union shop and a checkoff of union dues.

Despite the strike the Company continued its operations with a work force composed of non-striking employees, new hires, and returned strikers, and the Union, for its part, continued its strike activity.

(d) The decertification of the Union

In February, 1957, Robert English filed a petition seeking the decertification of the Union.[7] This proceeding was dismissed. At a later date, English filed a second petition for decertification,[8] and on September 12, 1957, the Board issued a Decision and Direction of Election in the last-mentioned proceeding. Pursuant thereto, the Regional Director (Los Angeles, California) conducted an election by secret ballot on September 25, 1957, with the result that of

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[6] General Counsel Exhibit Nos. 4, 5, 12.

[7] *Machinery Overhaul Company, Inc., and Robert English*. Case No. 21-RD-315.

[8] Same name as above. Case No. 21-RD-334.

106 votes cast, one vote was in favor of the Union; 90 were against the Union; 14 ballots were challenged, and one ballot was void. On September 30, 1957, the Union filed timely objections to the conduct affecting the results of election, which were found to be without merit by the Regional Director and by the Board, which on December 16, 1957 certified the results of the election—that the Union "is not the exclusive representative of the employees at the Employer's Palmdale, California, plant in the unit found in this proceeding to be appropriate . . ."

Despite its loss of the election and its decertification the Union continued to picket the premises of the Company and to engage in other conduct described hereafter.

(c) The Union's conduct

Counsel for the parties stipulated into evidence a series of photographs which portrayed certain conduct of the Union. These photographs were taken on September 24, 1956, December 19, 1957, January 2, 1958, and January 7, 1958.[9]

The photograph taken on September 24, 1956, shows an automobile and three pickets carrying placards which bear the legend, "Machinery Overhaul, Unfair to Organized Labor, AFL-CIO, Local No. 311, IAM." The pickets are patrolling across the road which leads into the Company's premises. The photograph of December 19, 1957, shows cars parked near the entrance to the Company's premises bearing picket placards which state, "International Association of Machinists, AFL, On Strike." The photograph taken on January 2, 1958, shows a truck and a picket each of which bears a placard, "International Association of Machinists, AFL, On Strike." The car and picket are at the entrance to the Company's premises. A second picture taken on the same date shows another car and picket

[9] General Counsel's Exhibit Nos. 6, 7, 8, 9, 10, 11.

bearing the same placard at a different position near the Company's premises. A third picture taken on this date shows an automobile and a man carrying a picket sign which is not legible in the photograph. The automobile and the man are standing near the spur of the Southern Pacific leading into the premises of the Company. The photograph taken on January 7, 1958, shows a truck and a picket bearing the "On Strike" placard previously noted, with an additional sign which is leaning against the truck, and which reads, "International Association of Machinists, AFL-CIO, Local 311."

On this subject, it was stipulated at the hearing that the Union, since September 18, 1956, up to the date of the hearing, had caused pickets to patrol at or near the premises of the Company, and that since on or about July 8, 1957, had placed the Company on an "Unfair List," and on a "We do not patronize" list.

Concluding Findings

Although counsel for the Union joined in the stipulations of fact which are the basis for the findings set forth above, he made it clear that he did not concede that any of the Union's conduct constituted the unfair labor practices alleged in the complaint. I cannot agree with that proposition. Recently the Board in a series of cases,[10] had occasion to deal with union conduct identical with that displaced here. The Board held that a minority union, which picketed an employer, and placed his name on "unfair" and "we do not patronize" lists, for the purpose of gaining from him exclusive recognition, and a union shop, violated Sections 8 (b) (1) (A) and (2) of the Act. Admittedly here, on the date of the election the Union was no longer a representative of a majority of the employees in the appropriate

[10] *Curtis Brothers, Inc.*, 119 NLRB No. 33; *Alloy Manufacturing Company*, 119 NLRB No. 38; *Shepherd Machinery Company*, 119 NLRB No. 39.

unit, and was thereafter decertified. Despite this change in its status, it continued its picketing and boycott activities without apparent change in either manner or purpose. Therefore, after its decertification, this picketing and boycotting, designed to force from the employer continued recognition and a union shop, constituted violations of the Act. On the undisputed facts found above, and the authority of the cases cited, I find that the Union has committed the unfair labor practices alleged in the complaint.

IV. *The effect of the unfair labor practices upon commerce*

The activities of the Union set forth in Section III above, occurring in connection with the activities of the Company described in Section I above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. *The remedy*

Having found that the conduct of the Union constitutes violations of Section 8 (b) (1) (A) and (2) of the Act, it will be recommended that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Upon the basis of the foregoing findings of fact, and upon the entire record in the case, the undersigned makes the following:

Conclusions of Law

1. International Association of Machinists, Local Lodge No. 311, AFL-CIO; International Association of Machinists, District Lodge No. 94, AFL-CIO; and International Association of Machinists, AFL-CIO, are labor organizations within the meaning of Section 2 (5) of the Act.

2. By Picketing the premises of Machinery Overhaul Company, Inc., and by placing the said Company's name on its unfair, and we do not patronize lists for the purpose of securing continued recognition as the statutory representative of the Company's employees, and for a union shop provision in a contract with that Company, when they did not represent a majority of the employees of said Company, the Respondent Unions have violated Sections 8 (b) (1) (A) and (2) of the Act.

Recommendations

Upon the basis of the foregoing findings of fact and conclusions of law and upon the entire record in the case, it is recommended that International Association of Machinists, Local Lodge No. 311, AFL-CIO, International Association of Machinists, District Lodge No. 94, AFL-CIO, and International Association of Machinists, AFL-CIO, their officers, representatives, agents, successors and assigns be ordered to:

1. Cease and desist from restraining or coercing the employees of Machinery Overhaul Company, Inc., in the exercise of the rights guaranteed in Section 7 of the Act by the following conduct: (a) Picketing the premises of Machinery Overhaul Company, Inc., and (b) By placing the name of the Company on its unfair and we do not patronize lists.

2. Take the following affirmative action which the undersigned finds will effectuate the policies of the Act:

(a) Post at their offices in Los Angeles, California, copies of the notices attached hereto and marked Appendix. Copies of said notice to be furnished by the Regional Director for the Twenty-first Region, shall, after being duly signed by representatives of Local Lodge No. 311, District Lodge No. 94, and the International, be posted immediately upon receipt thereof and maintained for a period

of sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent Unions to insure that such notices are not altered, defaced or covered by other material;

(b) Mail to the Regional Director for the Twenty-first Region copies of the notice attached hereto as Appendix, duly signed by the proper and qualified officers, for posting by Machinery Overhaul Company, Inc., said Company being willing, in places where they customarily post notices to employees. Copies of said notices, to be furnished by the Regional Director for the Twenty-first Region, shall, after being signed as provided for above, be forthwith returned to the said Regional Director for the Company's permissive posting;

(c) Notify the Regional Director for the Twenty-first Region in writing, within twenty (20) days from the date of receipt of this Intermediate Report and Recommended Order what steps they have taken to comply herewith.

It is further recommended that unless the Respondent Unions within twenty (20) days from the receipt of this Intermediate Report and Recommended Order shall notify said Regional Director in writing that they will comply with the foregoing recommendations, the National Labor Relations Board issue an order requiring Respondent Unions to take the aforesaid action.

It is further recommended, that in the event the Respondent Unions do not notify the Regional Director, as aforesaid, and the Respondent Unions continue the picketing and other conduct, found herein to be violative of the Act, that the National Labor Relations Board petition the appropriate United States District Court, pursuant to Section 10 (j) of the Act, for an injunction restraining such conduct, in order to prevent irreparable harm to the employees of the Company, in the exercise of their rights under Section 7 of the Act, to Machinery Overhaul Company, Inc., and to the statutory national labor policy and

the public welfare, pending a final order of the Board and the courts herein.

The preventive purposes of the Act will be thwarted unless the illegal conduct is stopped during the unavoidable delays attendant on the administrative process. Therefore, to make effective the guarantees of Section 7, and thus effectuate the purposes of the Act, I have included the above recommendation.[11]

Dated this day of April 1958.

DAVID F. DOYLE
David F. Doyle
Trial Examiner

APPENDIX

NOTICE

TO ALL MEMBERS OF INTERNATIONAL ASSOCIATION OF MACHINISTS, LOCAL LODGE NO. 311, AFL-CIO; INTERNATIONAL ASSOCIATION OF MACHINISTS, DISTRICT LODGE NO. 94, AFL-CIO; AND INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO

PURSUANT TO

THE RECOMMENDATIONS OF A TRIAL EXAMINER

of the National Labor Relations Board and in order to effectuate the policies of the National Labor Relations Act, we hereby give notice that:

WE WILL NOT restrain or coerce the employees of MACHINERY OVERHAUL COMPANY, INC., in the exercise of rights

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[11] As to the propriety of this procedure, see opinion delivered by Mr. Justice Jackson, for a unanimous court in *Joseph Garner and A. Joseph Garner, t/a Central Storage and Transfer Company* v. *Teamsters, Chauffeurs and Helpers Local Union No. 776, AFL*, 346 U.S. 485, December 14, 1953; *Jaffee* v. *Henry Heide*, 115 F. Supp. 52; *Brown* v. *Pacific Telephone and Telegraph Company*, 218 F. 2d 542 (C.A. 9); *LeBaron* v. *Los Angeles Building and Construction Trades Council; D. C.*, 84 F. Supp. 629, 636, aff. 9 Cir., 185 F. 2d 405.

guaranteed in Section 7 of the Act, including specifically the right to refrain from engaging in any or all of the activities guaranteed thereunder.

WE WILL NOT, by means of picketing or placing the Company's name on our unfair list or we do not patronize list, attempt to cause MACHINERY OVERHAUL COMPANY, INC., to recognize us as bargaining representative of the Company's employees, or to enter into an agreement with us, until such time as we are the lawfully constituted bargaining representative of said employees.

INTERNATIONAL ASSOCIATION OF MACHINISTS, LOCAL LODGE NO. 311, AFL-CIO
(Labor Organization)

Dated By
(Representative) (Title)

INTERNATIONAL ASSOCIATION OF MACHINISTS, DISTRICT LODGE NO. 94, AFL-CIO
(Labor Organization)

Dated By
(Representative) (Title)

INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO
(Labor Organization)

Dated By
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced or covered by any other material.

APPENDIX B

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case No. 21-CB-982

INTERNATIONAL ASSOCIATION OF MACHINISTS, LOCAL LODGE NO. 311, AFL-CIO; INTERNATIONAL ASSOCIATION OF MACHINISTS, DISTRICT LODGE NO. 94, AFL-CIO; and INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO

and

MACHINERY OVERHAUL COMPANY, INC.

and

SOUTHERN PACIFIC COMPANY, *Intervenor*

Order Amending Decision and Order

On January 29, 1959, the Board issued a Notice to Show Cause in the above-entitled proceeding as to why the Decision and Order[1] of October 3, 1958, should not be amended as proposed in the said Notice. Thereafter, on February 9, 1959, the Respondents filed opposition thereto on the grounds that the proposed amendments cover matters which are outside the scope of the exceptions and are predicated on the Court of Appeal's (D.C.) reversal of the Board's decision in *Curtis Brothers, Inc.*, 119 NLRB 232. The Board having duly considered the matter, and finding no merit to the opposition,

IT IS HEREBY ORDERED that the Decision and Order of October 3, 1958, be, and it hereby is, amended by substi-

[1] 121 NLRB No. 153.

tuting for Section 1 (b) of the Order Sections 1 (b) and (c) as follows:

(b) Attempting to cause Machinery Overhaul Company, Inc. by means of picketing or placing the Company's name on the Respondents' "unfair" list or "we do not patronize" list, to recognize the Respondents as the exclusive bargaining representatives of the Company's employees, when the Respondents do not represent a majority of such employees in an appropriate unit.

(c) Attempting to cause Machinery Overhaul Company, Inc., by means of picketing or placing the Company's name on the Respondents' "unfair" list or "we do not patronize" list, to enter into a union security agreement with the Respondents when the Respondents do not represent a majority of the Company's employees in an appropriate unit.

IT IS FURTHER ORDERED that the notice attached to the aforesaid Decision and Order as Appendix be, and it hereby is, amended by deleting the second section therefrom and substituting therefor the following:

WE WILL NOT by means of picketing or placing the Company's name on our "unfair" list or "we do not patronize" list attempt to cause MACHINERY OVERHAUL COMPANY, INC., to recognize us as the bargaining representative of the Company's employees until such time as we are the lawfully constituted bargaining representative of said employees.

WE WILL NOT by means of picketing or placing the Company's name on our "unfair" list or "we do not patronize" list attempt to cause MACHINERY OVERHAUL COMPANY, INC., to enter into a union security agreement with us until such time as we are the law-

fully constituted bargaining representatives of the Company's employees.

IT IS FURTHER ORDERED that the aforesaid Decision and Order, as printed, shall appear as hereby amended.[2]

Dated, Washington, D. C., February 26, 1959.

By direction of the Board:

FRANK M. KLEILER
Executive Secretary

[2] *Member Fanning* dissents from this Order.

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International Association of Machinists, Lodge 942, AFL–CIO v. *National Labor Relations Board*, pending on petition for certiorari, No. 57, this Term — 6

Joint Council of Sportswear Workers v. *National Labor Relations Board*, No. 14,486 (C.A.D.C.) — 7

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United Hatters v. *National Labor Relations Board*, No. 15,087 (C.A.D.C.) — 7

United Rubber, Cork, Linoleum & Plastic Workers etc., v. *National Labor Relations Board*, pending on petition for certiorari, No. 316, this Term — 6

Statute:

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 317

INTERNATIONAL ASSOCIATION OF MACHINISTS, LOCAL LODGE NO. 311, AFL–CIO; INTERNATIONAL ASSOCIATION OF MACHINISTS, DISTRICT LODGE NO. 94, AFL–CIO; AND INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL–CIO, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The petition for the writ has been filed in advance of judgment by the Court of Appeals. The decision and order of the National Labor Relations Board (Pet. 1a–21a) are reported at 121 NLRB No. 153. The Board's supplemental order amending its decision and order (Pet. 22a–24a) is unreported.

JURISDICTION

The petition is filed in advance of judgment by the Court of Appeals. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a union, which does not represent a majority of the employees, violates Section 8(b)(1)(A) of the National Labor Relations Act by picketing the employer and placing its name on "Unfair" and "We Do Not Patronize" lists for the purpose of gaining immediate recognition as the exclusive bargaining representative of the employees.

2. Whether a union which does not represent a majority of the employees violates Section 8(b)(1)(A) and 8(b)(2) of the Act by engaging in the above conduct for the purpose of obtaining a union shop agreement.[1]

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*) are as follows:

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring member-

[1] As the petition discloses (pp. 3, 15), the second question is not reached unless the Board's factual finding that the purpose of the union was to obtain such an agreement is first affirmed.

ship in a labor organization as a condition of employment as authorized in section 8(a)(3).

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made * * *.

* * * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: * * *

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership

in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * *

STATEMENT [2]

On June 29, 1956, the Board certified petitioners, hereinafter called the Union, as the bargaining representative of the employees of Machinery Overhaul Company, Inc., hereinafter called the Company, in an appropriate unit. Thereafter, between August 14 and September 13, 1956, the Union and the Company met for the purpose of negotiating an agreement. The Union proposed a contract which, *inter alia,* provided for a union shop and checkoff of union dues. The Company's counterproposals contained no provision for a union shop or checkoff of union dues and in general were couched in terms more favorable to the Company. The negotiations reached a stalemate, and on September 18, 1956, the Union struck and began picketing the Company's plant. Thereafter, the parties met again but were unable to agree on the union shop provision which the Union demanded.

On September 12, 1957, on the petition filed by an individual employee requesting that the Union be decertified as the bargaining representative of the employees, the Board directed an election. Of 106 votes cast in the election, 90 were against the Union, 14 were

[2] The subsidiary facts set forth in the Statement, as to which there is no dispute, are taken from the Intermediate Report of the Board's Trial Examiner which is set out in full at pp. 8a–21a of the petition.

challenged, and one ballot was void. Accordingly, on December 16, 1957, the Board decertified the Union as the bargaining representative of the employees.

The Union continued to picket the Company's plant with signs or placards bearing the legend "Machinery Overhaul, Unfair to Organized Labor, AFL–CIO, Local No. 311, IAM" or "International Association of Machinists, AFL, On Strike." The Union also continued to place the Company on an "Unfair" list which may be posted at the Union's halls, and also on a "We Do Not Patronize" list which is published in a union newspaper circulated among its subscribers.

The Board, one member dissenting, found that the Union violated Section 8(b)(1)(A) and (2) of the Act by picketing the Company and placing its name on the "Unfair" and "We Do Not Patronize" lists for the purpose of gaining exclusive recognition and a union shop after the Union had been decertified as the exclusive bargaining representative of the employees in the appropriate unit (Pet. 2a). The Board directed the Union to refrain from the unfair labor practices found (Pet. 4a, 22a).

The Union petitioned the court below to review and set aside the Board's order. On July 21, 1959, the court ordered that "further proceedings in this case be held in abeyance pending final disposition by the Supreme Court of the case of *National Labor Relations Board* v. *Drivers Local Union No. 639*, No. 717, October Term, 1958, renumbered No. 34, October Term, 1959, with leave to [the Union] to apply to this court by appropriate motion to vacate the stay of proceedings

herein if and when the Supreme Court denies their petition for writ of certiorari in [the instant] case." (R. 58).

ARGUMENT

As previously noted, the petition is filed in advance of judgment by the court below and seeks direct review by the Court of the Board's decision and order. Even if it were to be assumed that the Court has jurisdiction to review directly the order of an administrative agency before judgment by a lower court,[1] there is little warrant for such extraordinary action in the instant case.

The Board's decision and order here is based upon its prior decisions in *Curtis Bros., Inc.*, 119 NLRB 232, and *Alloy Manufacturing Co.*, 119 NLRB 307. Both of these cases are now pending before this Court, one on writ of certiorari, and the other on petition for certiorari, to review the judgment of the respective courts of appeals. *National Labor Relations Board* v. *Drivers, Local No. 639*, certiorari granted, 359 U.S. 965, No. 34, this Term; *International Association of Machinists, Lodge 942, AFL–CIO* v. *National Labor Relations Board*, No. 57, this Term. In addition, there is a third case, pending on petition for certiorari, which raises the questions presented by petitioners here. *United Rubber, Cork, Linoleum & Plastic Workers, etc.* v. *National Labor Relations Board*, No. 316, this Term.

[1] See Robertson and Kirkham, *Jurisdiction of the Supreme Court*, §§ 132, 164 (Wolfson and Kurland ed., 1951); Stern and Gressman, *Supreme Court Practice*, 14 (2d ed. 1954).

Little purpose would be served by adding another case, dealing with the same subject-matter, to this Court's docket especially in advance of judgment by the court below. This is particularly so in view of the circumstance that the court below has directed the case to be held in abeyance pending this Court's ultimate decision in the related case, No. 34. Board orders are not self-executing; hence, pending this Court's actions in the cases now before it, petitioners are not being prejudiced in any way. An additional consideration further militates against issuance of the writ in advance of judgment. Petitioners' second question is not, in its present posture, ripe for review by this Court. As noted above, petitioners challenge the evidentiary foundation for the Board's determination of that issue. Review of such factual issues is normally a matter for the courts of appeals and not, certainly in the first instance, for this Court. Finally, it may be pointed out that there are now pending in various courts of appeals five like cases, three of them in the court below.[4] If the writ issues in the instant case, there would be no reason for withholding similar action in these other cases, if petitions in advance of judgment should also be filed in them.

---

[4] *Joint Council of Sportswear Workers* v. *National Labor Relations Board*, No. 14,486 (C.A.D.C.); *Retail Store Employees Union, Local 1595* v. *National Labor Relations Board*, No. 14,557 (C.A.D.C.); *United Hatters* v. *National Labor Relations Board*, No. 15,087 (C.A.D.C.); *National Labor Relations Board* v. *Teamsters, Local 182*, No. 25,475 (C.A. 2); *National Labor Relations Board* v. *Paint, Varnish & Lacquer Makers Union*, No. 16,204 (C.A. 9).

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.[5]

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

STUART ROTHMAN;
General Counsel,
THOMAS J. MCDERMOTT,
Associate General Counsel,
DOMINICK L. MANOLI,
Assistant General Counsel,
NORTON J. COME,
Deputy Assistant General Counsel,
National Labor Relations Board.

OCTOBER 1959.

[5] The Court's attention is also invited to the memorandum for the Board which has been filed in No. 316.

U.S. GOVERNMENT PRINTING OFFICE: 1959